

## 1 UNITED STATES DISTRICT COURT

## 2 WESTERN DISTRICT OF TEXAS

## 3 SAN ANTONIO DIVISION

4  
5 ASSOCIATED BUILDERS AND ) CIVIL NO. 1:15-00026-RP  
6 CONTRACTORS OF TEXAS, INC. )  
7 et al. )  
8 vs. ) April 24, 2015  
9 NATIONAL LABOR RELATIONS )  
10 BOARD )  
11 DEFENDANT. )  
12

13 TRANSCRIPT OF ORAL ARGUMENTS  
14 BEFORE THE HONORABLE ROBERT L. PITMAN  
15 DISTRICT COURT JUDGE

## 16 APPEARANCES:

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1           So I stop there because final agency action was one  
2 the criteria and because the Board has made an issue about  
3 what's final and what's not final. The rule is final.

4           And then the question of whether further factual  
5 investigation is needed to assist, and it is not.

6           But let me go right to the discretion issue. You  
7 raised it. The Board has certainly raised it quite a bit.

8           And the reality is, we are talking about situations  
9 where, first, the rule is limiting discretion. It is telling  
10 the regional directors to do things they have never been told  
11 to do before and conversely is allowing them to do things  
12 they have never been allowed to do before and things that  
13 violate the statute.

14           And so it is the instructions that the rule is  
15 issuing, even those where it says, "Well, in extraordinary  
16 circumstances you can tinker with it a little bit." That  
17 does not allow them to escape.

18           And they cited only one case, really, which stands  
19 for the proposition that discretion should make a difference.  
20 It's the Action Alliance case in the D.C. Circuit.

21           And since they cited that, in the reply, I just  
22 wanted to give you a couple of cases to look at, like the  
23 National Association of Home Builders case, which is at 440  
24 F.3d, page 465, another D.C. Circuit case, which  
25 specifically, in their own words, debunks the idea that

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1 because agencies reserve some discretion, that that makes it  
2 non-reviewable at the rule-making stage.

3 Cablevision is another such case, 649 F.3d, 695,  
4 D.C. Circuit 2011. And in there, the decision, it says,  
5 "Discretion is a separate issue."

6 Why? Because it's the instructions, the rule  
7 itself, and also because these agents -- the Courts have  
8 said, "Agencies always have some kind of discretion."

9 If you took that to its logical extension, one  
10 would never be able to do a rule challenge because agencies  
11 can almost always say, "We have some room to exercise our  
12 agency discretion."

13 There is really nothing more than that going on in  
14 this case. And so --

15 THE COURT: A red flag to me though -- it's in your  
16 briefing -- when you have to say things like, the rule  
17 strongly discourages and, in effect, disallows. Those are  
18 sort of qualifying words that almost admit that you have got  
19 a problem that they have identified.

20 MR. BASKIN: Well, that's because one can never say  
21 that there is -- that because they give some legal room, the  
22 fact that they are, that the Board is discouraging and is, in  
23 effect, doing these things, is a change from the law.

24 I'll give one example. The issue of preclusion.  
25 And, really, our claim boils down to three things:

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